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# Lim Kuan Chyin v Chu Hoi Ming

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HIGH COURT (KUALA LUMPUR) — APPEAL NO WA-12ANCC-71–05 OF 2022
ATAN MUSTAFFA J
26 MAY 2023

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*Contract — Agreement — Breach — Appellant and respondent executed two agreements for appellant to purchase company's shares from respondent — Appellant unable to perform his obligation under second agreement — Respondent filed action against appellant for reliefs and appellant applied to strike out respondent's claim — Appeal against dismissal of striking out application — Whether cl 5.03(1) of second agreement binding on respondent and prevented respondent from pursuing specific performance — Whether cl 5.03 of second agreement restricted respondent from seeking specific performance and other remedies for breach of contract — Whether respondent's claims were in breach of cl 5.03(1) of second agreement — Whether declaratory relief sought should be granted*

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This was an appeal against the decision of the sessions court in dismissing the appellant's ('defendant') application to strike out the respondent's ('plaintiff') action. The defendant and the plaintiff were shareholders and directors of Glamour Sound Sdn Bhd ('the company'). The plaintiff prepared a written agreement ('the first agreement') for the disposal of the plaintiff's shares to the defendant which was executed by both the plaintiff and the defendant. Subsequently a sale and purchase agreement ('the second agreement') was executed between the defendant and the plaintiff where the defendant being the purchaser agreed to purchase the said company's shares from the plaintiff as the vendor based on the detailed terms set out therein. The defendant then paid a sum of RM80,000 pursuant to the second agreement ('the first sum'). The defendant and the plaintiff later executed a shares sale agreement for the sale of the plaintiff's 250,000 units of ordinary shares in the company. The plaintiff subsequently resigned as a director of the company and transferred his shares in the company to the defendant. The was non-compliance with cll 4.01(b), 4.02, 4.03, 4.04 and 4.05 of the second agreement which were related to the defendant's obligations to pay the plaintiff a sum of RM40,000. The plaintiff issued notices of demand and the defendant replied that the defendant was unable to perform his obligation under the second agreement and the plaintiff was at liberty to exercise his remedy to terminate the agreement pursuant to cl 5.03(1) of the second agreement. Subsequently, the plaintiff filed an action against the defendant at the sessions court and prayed for various reliefs, including a declaration that the first agreement and second agreement were

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valid and binding, a declaration of the defendant's breaches, specific performance of the agreements' terms, damages, and in the alternative, for the defendant to pay compensation to the plaintiff if the court found that the defendant had committed breached the agreements. The defendant filed an application pursuant to O 18 r 19 of the Rules of Court 2012 to strike out the plaintiff's claims. The learned sessions court judge dismissed the striking out application and hence this appeal.

**Held**, allowing the appeal:

(1) The plaintiff was bound by cl 5.03(1) of the second agreement even when the first agreement and the second agreement were read harmoniously as there was no conflict between the two agreements. The plaintiff had not demonstrated either in the affidavits or his submissions as to why the terms and conditions of the first agreement would support his position that he was entitled to the relief of specific performance as prayed for. The submissions of the plaintiff on this issue were therefore inconsequential to the issue of whether the plaintiff could claim for the reliefs for specific performance in this action (see para 20).

(2) A plain reading of cl 5.03 of the second agreement as a whole would show that the remedy of specific performance was only available to the defendant when the plaintiff breached the second agreement. As the remedy of specific performance was available to the defendant (the purchaser) when there was breach of cl 5.03(2) by the plaintiff but was not available to the plaintiff (the vendor) when the defendant breached cl 5.03(1), it was only logical and commonsensical to interpret the two clauses together to mean that the option for specific performance was only available to the defendant when the plaintiff breached the second agreement, but it was not an option nor election available to the plaintiff. The plaintiff's argument that as the words 'shall be entitled' was used in cl 5.03 of the second agreement the term did not confine the plaintiff's rights to a claim for liquidated damages alone and the right to action for damages for breach of contract was not taken away since this was not expressly provided was erroneous as it was clear from a comparison of cl 5.03(1) and cl 5.03(2) that as the remedy of specific performance was available in the latter and not the former, the right of the plaintiff to claim for specific performance was contractually removed when the breach was by the defendant (see paras 23, 25 & 31).

(3) The plaintiff's claim and reliefs were in breach of cl 5.03 of the second agreement. The main prayers for specific performance, general damages, and exemplary damages were unsustainable. Specific performance was not available to the plaintiff. Regarding the claim for general damages, the plaintiff could only forfeit the first sum already paid by the defendant, which was a specific amount. This rendered the claim for general

damages unsustainable. The plaintiff's claim for exemplary damages also lacked a legal basis, as the criteria for such damages were not met. Lastly, it was clear that the plaintiff, by refusing to comply with cl 5.03(1) of the second agreement, was attempting to benefit from their own breach. The word 'shall' in the phrase 'shall be entitled' found in cl 5.03(1) of the second agreement was interpreted to mean that the remedy of termination of the second agreement and forfeiture of the first sum as agreed liquidated damages was mandatory in nature in the construction of contract. Therefore, by refusing to comply with cl 5.03(1) of the second agreement and initiating a legal action instead on the basis of the breach of cl 4.01(b), 4.02, 4.03 and 4.04 under Article IV of the second agreement against the defendant at the sessions court and claiming for the reliefs which contradicted with the reliefs provided under cl 5.03(1) of the second agreement, the plaintiff was breaching the second agreement. The plaintiff could not be allowed to take advantage of his own breach (see paras 32–36).

(4) The declaratory relief sought was unnecessary and infructuous. The declaration that sought both the first and second agreement were valid and binding was academic and served no purpose. The declaration that the defendant purportedly 'breached' the terms and conditions of the agreement also served no purpose as there was no issue on this as given that the defendant had breached the agreement, the plaintiff only had to follow the remedy in cl 5.03(1) of the second agreement (see paras 37–39).

**[Bahasa Malaysia summary**

Ini adalah rayuan terhadap keputusan mahkamah sesyen yang menolak permohonan perayu ('defendan') untuk membatalkan tindakan responden ('plaintif'). Defendan dan plaintif adalah pemegang saham dan pengarah Glamour Sound Sdn Bhd ('syarikat'). Plaintif menyediakan perjanjian bertulis ('perjanjian pertama') untuk pelupusan saham plaintif kepada defendan yang telah dilaksanakan oleh kedua-dua plaintif dan defendan. Selepas itu satu perjanjian jual beli ('perjanjian kedua') telah dilaksanakan antara defendan dan plaintif di mana defendan sebagai pembeli bersetuju untuk membeli saham syarikat tersebut daripada plaintif sebagai penjual berdasarkan terma terperinci yang dinyatakan di dalamnya. Defendan kemudian membayar sejumlah RM80,000 menurut perjanjian kedua ('jumlah pertama'). Defendan dan plaintif kemudiannya melaksanakan perjanjian penjualan saham untuk penjualan 250,000 unit saham biasa plaintif dalam syarikat tersebut. Plaintif kemudiannya meletak jawatan sebagai pengarah syarikat dan memindahkan sahamnya dalam syarikat itu kepada defendan. Terdapat ketidakpatuhan kepada klausa 4.01(b), 4.02, 4.03, 4.04 dan 4.05 perjanjian kedua yang berkaitan dengan kewajipan defendan untuk membayar plaintif sejumlah RM40,000. Plaintif mengeluarkan notis tuntutan dan defendan menjawab

bahawa defendan tidak dapat melaksanakan kewajipannya di bawah perjanjian kedua dan plaintif bebas untuk menggunakan remedinya untuk menamatkan perjanjian itu menurut klausa 5.03(1) perjanjian kedua. Selepas itu, plaintif memfailkan tindakan terhadap defendan di mahkamah sesyen dan memohon pelbagai relif, termasuk pengisytiharan bahawa perjanjian pertama dan perjanjian kedua adalah sah dan mengikat, pengisytiharan pelanggaran defendan, pelaksanaan khusus terma perjanjian, ganti rugi, dan sebagai alternatif, untuk defendan membayar pampasan kepada plaintif jika mahkamah mendapati bahawa defendan telah melanggar perjanjian. Defendan memfailkan permohonan menurut A 18 k 19 Kaedah-Kaedah Mahkamah 2012 untuk membatalkan tuntutan plaintif. Hakim mahkamah sesyen yang bijaksana telah menolak permohonan pembatalan dan oleh itu rayuan ini.

**Diputuskan**, membenarkan rayuan:

(1) Plaintif terikat dengan klausa 5.03(1) perjanjian kedua walaupun perjanjian pertama dan perjanjian kedua dibaca secara harmoni kerana tiada konflik antara kedua-dua perjanjian. Plaintif tidak menunjukkan sama ada dalam afidavit atau penghujahannya tentang mengapa terma dan syarat perjanjian pertama akan menyokong pendiriannya bahawa dia berhak mendapat relif pelaksanaan spesifik seperti yang dipohon. Oleh itu, hujahan plaintif mengenai isu ini adalah tidak penting kepada isu sama ada plaintif boleh menuntut relif untuk pelaksanaan spesifik dalam tindakan ini (lihat perenggan 20).

(2) Bacaan jelas klausa 5.03 perjanjian kedua secara keseluruhan akan menunjukkan bahawa remedi pelaksanaan spesifik hanya tersedia kepada defendan apabila plaintif melanggar perjanjian kedua. Memandangkan remedi pelaksanaan spesifik tersedia kepada defendan (pembeli) apabila terdapat pelanggaran klausa 5.03(2) oleh plaintif tetapi tidak tersedia kepada plaintif (penjual) apabila defendan melanggar klausa 5.03(1), ia hanya logik dan masuk akal untuk mentafsirkan kedua-dua fasal itu bersama-sama bermakna bahawa pilihan untuk pelaksanaan spesifik hanya tersedia kepada defendan apabila plaintif melanggar perjanjian kedua, tetapi ia bukan pilihan atau pilihan yang tersedia untuk plaintif. Hujahan plaintif bahawa oleh kerana perkataan 'hendaklah berhak' digunakan dalam klausa 5.03 perjanjian kedua istilah itu tidak mengehadkan hak plaintif untuk tuntutan ganti rugi yang ditentukan sahaja dan hak untuk tindakan bagi ganti rugi bagi pelanggaran kontrak adalah tidak diambil kerana ini tidak diperuntukkan dengan nyata adalah salah kerana jelas daripada perbandingan klausa 5.03(1) dan klausa 5.03(2) bahawa memandangkan remedi pelaksanaan spesifik tersedia bagi yang kemudian dan bukannya yang pertama, hak plaintif untuk menuntut pelaksanaan spesifik telah dikeluarkan secara kontrak

apabila pelanggaran itu dilakukan oleh defendan (lihat perenggan 23, 25 & 31).

(3) Tuntutan dan relif plaintif telah melanggar klausa 5.03 perjanjian kedua. Permohonan utama untuk pelaksanaan spesifik, ganti rugi am dan ganti rugi teladan tidak dapat dikekalkan. Pelaksanaan spesifik tidak tersedia kepada plaintif. Berkenaan tuntutan ganti rugi am, plaintif hanya boleh mengambil jumlah pertama yang telah dibayar oleh defendan, iaitu jumlah tertentu. Ini menyebabkan tuntutan ganti rugi am tidak dapat dikekalkan. Tuntutan plaintif untuk ganti rugi teladan juga tidak mempunyai asas undang-undang, kerana kriteria untuk ganti rugi tersebut tidak dipenuhi. Akhir sekali, adalah jelas bahawa plaintif, dengan enggan mematuhi klausa 5.03(1) perjanjian kedua, cuba untuk mendapat manfaat daripada pelanggaran mereka sendiri. Perkataan 'hendaklah' dalam frasa 'hendaklah berhak' yang terdapat dalam klausa 5.03(1) perjanjian kedua ditafsirkan bermaksud bahawa remedi penamatan perjanjian kedua dan pelucuthakan jumlah pertama sebagai ganti rugi yang ditentukan yang dipersetujui adalah mandatori dalam sifat dalam pembinaan kontrak. Oleh itu, dengan menolak untuk mematuhi klausa 5.03(1) perjanjian kedua dan sebaliknya memulakan tindakan undang-undang berdasarkan pelanggaran klausa 4.01(b), 4.02, 4.03 dan 4.04 di bawah Perkara IV perjanjian kedua terhadap defendan di mahkamah sesyen dan menuntut relif yang bercanggah dengan relif yang diperuntukkan di bawah klausa 5.03(1) perjanjian kedua, plaintif telah melanggar perjanjian kedua. Plaintif tidak boleh dibenarkan mengambil kesempatan daripada pelanggarannya sendiri (lihat perenggan 32–36).

(4) Relif pengisytiharan yang dipohon adalah tidak perlu dan sia-sia. Perisytiharan yang dipohon kedua-dua perjanjian pertama dan kedua adalah sah dan mengikat adalah akademik dan tidak mempunyai tujuan. Pengisytiharan bahawa defendan kononnya 'melanggar' terma dan syarat perjanjian itu juga tidak mempunyai tujuan kerana tidak ada isu mengenai perkara ini memandangkan defendan telah melanggar perjanjian, plaintif hanya perlu mengikut remedi dalam klausa 5.03(1) perjanjian kedua (lihat perenggan 37–39).]

**Cases referred to**

*Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, FC (refd)

*CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1, FC (distd)

*Catajaya Sdn Bhd v Shoppoint Sdn Bhd & Ors* [2021] 2 MLJ 374, FC (refd)

*Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; [1993] 1 MLRH 142, HC (distd)

*Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122, CA (refd)
*Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587, CA (refd)
*Goh Joon v Kerajaan Negeri Johor & Ors* [1998] 7 MLJ 621, HC (refd)
*James Hugh Hutchison and another v Mary Graham's executrix* [2006] SCLR 587 (refd)
*Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610, CA (distd)
*Lucy Wong Nyuk King (F) & Anor v Hwang Mee Hiong (F)* [2016] 3 MLJ 689, FC (refd)
*MBf Insurans Sdn Bhd v Lembaga Penyatuan & Pemulihan Tanah Persekutuan (FELCRA)* [2008] 2 MLJ 398, CA (refd)
*Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489, CA (refd)
*Raja Singam a/l Velu lwn Affin-ACF Finance Bhd dan lain-lain* [2007] 6 MLJ 430, HC (refd)
*SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464, FC (refd)
*Scottish Power UK plc v BP Exploration Operating Co Ltd and others* [2016] 1 All ER (Comm) 536, QBD (refd)

**Legislation referred to**

Contracts Act 1950 s 29
Rules of Court 2012 O 18 r 19, O 18 r 19(1)(a), (1)(b), (1)(d)

*Justin Voon Tiam Yu (with Caroline Lim Seah Le) (Justin Voon Chooi & Wing) for the appellant.*
*Cynthia Lee Mei Fei (with Muhammad Azrul Haziq) (Nazmi Zaini Chambers) for the respondent.*

**Atan Mustaffa J:**

**[1]** This is an appeal against the decision of the sessions court dated 24 May 2022, dismissing the appellant's application to strike out the respondent's action pursuant to O 18 r 19(1)(a), (b) or (d) of the Rules of Court 2012 ('the ROC') with costs in the cause. The writ action concerned the appellant's breach of a sale and purchase agreement of shares wherein the respondent is seeking various declarations and specific performance from the defendant, as well as damages and costs.

**[2]** I allowed the appellant's appeal on 23 August 2022 with costs of RM6,000. These are my grounds of judgment. The parties shall be referred to as they were identified in the sessions court ie the appellant is referred to as 'the defendant' and the respondent is referred to as 'the plaintiff'.

BRIEF FACTS

**[3]** The defendant and the plaintiff were shareholders and directors of Glamour Sound Sdn Bhd ('the company') which was incorporated in 2003. The defendant and the plaintiff each owned 50% of the shares in the company and both the plaintiff and the defendant were the directors for the company.

**[4]** On or around 25 July 2018, the plaintiff prepared a written agreement ('the first agreement') for the disposal of the plaintiff's shares to the defendant which was executed by both the plaintiff and the defendant. The first agreement is a one-page document containing only basic terms.

**[5]** Subsequently a sale and purchase agreement dated 7 November 2019 ('the second agreement') was executed between the defendant and the plaintiff where the defendant being the purchaser agrees to purchase the said company's shares from the plaintiff as the vendor based on the detailed terms set out therein.

**[6]** The defendant then paid a sum of RM80,000 pursuant to section 4.01(1)(a) of the second agreement. This was defined as 'the First Sum' under the second agreement.

**[7]** On 7 November 2019 the defendant and the plaintiff executed a shares sale agreement for the sale of the plaintiff's 250,000 units of ordinary shares in the company. On 11 November 2019 the plaintiff resigned as a director of the company and on 3 December 2019 the plaintiff transferred his shares in the company to the defendant.

**[8]** The plaintiff did not comply with cll 4.01(b), 4.02, 4.03, 4.04 and 4.05 of the second agreement which were related to the defendant's obligations to pay the plaintiff a sum of RM40,000, causing the discharge of the plaintiff as a guarantor for the company's credit facilities, the payment of 50% of the monthly director's fee by the defendant to the plaintiff, the defendant's purchase of the plaintiff's shares in the properties jointly owned by the plaintiff and defendant and the payment to the plaintiff from the payments collected from the company's debtors.

**[9]** On 17 July 2020 and 7 February 2022 the plaintiff issued notices of demand through his solicitors, to demand for the compliance of the terms and conditions under the second agreement. On 11 February 2022, the defendant through his solicitor replied to the notice of demand dated 7 February 2022 and informed that the defendant is unable to perform his obligation under the second agreement and the plaintiff is at liberty to exercise his remedy to terminate the agreement pursuant to section 5.03(1) of the second agreement.

A It is also stated in the letter that the defendant at all material time is ready to transfer back the company shares to the plaintiff and to reinstate the plaintiff as the director of the company pursuant to section 5.03(1) of the second agreement.

B **[10]** Subsequently, the plaintiff filed an action against the defendant at the sessions court on 28 February 2022 and prayed for various reliefs, including a declaration that the first agreement and second agreement are valid and binding, a declaration of the defendant's breaches, specific performance of the agreements' terms, damages, and in the alternative, for the defendant to pay C compensation to the plaintiff if the court finds that the defendant has committed breached the agreements.

**[11]** On 23 March 2022, the defendant filed an application in encl 6 pursuant to O 18 r 19 of the ROC to strike out the plaintiff's claims. On D 24 May 2022, the learned sessions court dismissed the striking out application with order for costs in the cause. On 27 May 2022, the defendant filed an appeal against the whole of this decision.

E THE RELIEFS SOUGHT BY THE PLAINTIFF IN THE SESSIONS COURT

**[12]** The reliefs sought by the plaintiff in the sessions court in para 18 of the statement of claim are reproduced below in English for convenient reference:

F 18. Therefore, the Plaintiff seeks the following reliefs against the Defendant, jointly and/or severally:

a. A declaration that the Sale and Purchase Agreement dated 25.7.2018 and the Share Purchase Agreement dated 7.11.2019 (collectively referred to as 'the said Agreements') are valid and legally binding upon the Plaintiff and G Defendant.

b. A declaration that the Defendant has breached the terms and conditions of the said Agreements by failing and/or refusing and/or neglecting to:

i. Settle the remaining purchase payment to the Plaintiff in the amount of RM40,000.00; H

ii. Discharge and/or if necessary, replace the Plaintiff as a guarantor for all financing facilities obtained by Glamour Sound Sdn Bhd in his capacity as a director and shareholder of the company;

iii. Reimburse a sum of money as director's fees to the Plaintiff in the I amount of RM92,500.00, calculated from the period of 1.1.2019 to 31.1.2022; and

iv. Execute the transfer process, including signing the sale and purchase agreement for the jointly-owned properties by the Plaintiff and Defendant, and making the necessary payment for the

sale and purchase of the said properties in the amount of RM525,000.00 to the Plaintiff.

c. Specific performance against the Defendant based on the terms and conditions of the said Agreements to carry out the following:

i. Discharge and/or if necessary, replace the Plaintiff as a guarantor for all financing facilities obtained by Glamour Sound Sdn Bhd in his capacity as a director and shareholder of the company within thirty (30) days from the date of this Court order;

ii. Execute the transfer process, including signing the sale and purchase agreement for the jointly-owned properties by the Plaintiff and Defendant, and completing the payment for the sale and purchase of the said properties in the amount of RM525,000.00 to the Plaintiff within thirty (30) days from the date of this Court order;

iii. Settle the outstanding purchase payment and director's fees based on the terms and conditions of the said Agreements claimed by the Plaintiff in the amount of RM132,500.00 within thirty (30) days from the date of this Court order.

d. Damages;

e. Exemplary damages;

f. Alternatively, if the Court finds that the Defendant has committed a breach, the Defendant shall pay specific damages to the Plaintiff together with interest at the rate of five percent (5%) per annum from the date of breach until the date of full settlement.

g. Costs of this action; and

h. Any further and/or other relief deemed appropriate and just by this Honorable Court.

## THE DEFENDANT'S SUBMISSIONS

**[13]** The defendant's main submissions are as follows:

(a) the second agreement has superseded the first agreement due to inconsistencies between the two agreements, and maintains that section 5.03(1) of the second agreement is binding, rendering the plaintiff's claims for specific performance baseless;

(b) a plain reading of section 5.03 of the second agreement shows that the remedy of specific performance is only available to the defendant in case of the plaintiff's breach, not vice versa, and that the clauses should be interpreted together to mean that specific performance is an option only for the defendant;

(c) as the remedies outlined in section 5.03 provide clear and unambiguous consequences for breaches by either party the interpretation of the contract renders oral evidence irrelevant;

(d) the plaintiff's claim and prayers for reliefs, including specific performance, general damages and exemplary damages in paras 18(c), 18(d) and 19(e) of the statement of claim are unsustainable and in breach of section 5.03 of the second agreement; and

(e) the declaratory reliefs requested in paragraphs 18(a) and 18(b) of the statement of claim are unnecessary and serve no purpose since there is no dispute regarding the validity and binding nature of the agreements and the defendant has expressed willingness to comply with section 5.03(1) of the second agreement, and the breach by the defendant is already acknowledged.

## THE PLAINTIFF'S SUBMISSIONS

**[14]** The plaintiff's main submissions are as follows:

(a) both the first agreement and the second agreement are valid and binding, with no conflict between them and claims that the defendant is estopped from denying the binding status of the first agreement;

(b) cl 5.03(1) does not limit his ability to seek reliefs or remedies, including specific performance, as otherwise it would be illogical and contrary to business common sense; and

(c) the plaintiff's claims should not be struck out without a full trial to properly examine the evidence and resolve legal and factual matters.

## ISSUES BEFORE THE COURT

**[15]** From examination of the facts and the respective positions taken by the plaintiff and the defendant, I frame the following issues for the determination of the court in this application:

(a) whether the second agreement supersedes the first agreement, rendering section 5.03(1) of the second agreement binding on the plaintiff and prevents the plaintiff from pursuing specific performance;

(b) whether cl 5.03 of the second agreement restricts the plaintiff from seeking specific performance and other remedies for a breach of contract;

(c) whether the plaintiff's claims for specific performance, general damages, and exemplary damages in paras 18(c), (d), and (e) of the statement of

claim are unsustainable under section 5.03 of the second agreement on the ground that the plaintiff's actions constitute a breach of the agreement; and

(d) whether the declaratory relief sought in paras 18(a) and 18(b) of the statement of claim should be granted considering the lack of dispute on the validity and binding nature of the agreements.

## KEY PROVISIONS FOR CONSIDERATION

**[16]** The key contractual provisions for the consideration of the court are found in section 5.03 of the second agreement. For convenient reference this is reproduced below:

> Section 5.03 Non-completion
>
> (1) Notwithstanding any provisions to the contrary in this Agreement, in the event the Purchaser shall fail to pay any of the Considerations in accordance with Article IV, the Vendor shall be entitled to terminate this Agreement and forfeit the First Sum as agreed liquidated damages in which event the Purchaser shall retransfer the Sale Shares to the Vendor and to reinstate the Vendor's position as a director of the Company whereupon this Agreement shall be deemed as null and void and of no further effect and neither party hereto shall have any rights hereunder against the other party hereto (save in respect of any antecedent breach of this Agreement).
>
> (2) Notwithstanding any provisions to the contrary in this Agreement, in the event the Vendor shall fail to comply with any of the provisions of this Agreement, the Purchaser shall be entitled, at the Purchaser's option, to:-
>
> (i) specific performance of the sale and purchase hereunder of the Sale Shares;
>
> or
>
> (ii) by notice in writing (hereinafter referred to as 'the Election Notice') served on the Vendor to elect to accept a sum in an amount equivalent to the First Sum as agreed liquidated damages (which amount shall hereinafter be referred to as 'the Liquidated Damages') from the Vendor who shall, on or before the expiry of seven (7) days from the date of the Election Notice, pay the Liquidated Damages to the Purchaser and cause all the monies paid by the Purchaser pursuant to this Agreement to be refunded to the Purchaser, the Purchaser shall retransfer the Sale Shares to the Vendor and to reinstate the Vendor's position as a director of the Company whereupon this Agreement shall be deemed as null and void and of no further effect and neither party hereto shall have any rights hereunder against the other party hereto (save in respect of any antecedent breach of this Agreement).

## ANALYSIS AND FINDINGS OF THE COURT

*Section 5.03(1) of the second agreement is binding*

**[17]** The plaintiff argued that the first agreement and the second agreement remain valid and binding and there is no conflict between the two agreements. It is contended that there is no evidence to suggest any intention to supersede or terminate either agreement. There is also an absence of a superseding clause or an entire agreement clause in the second agreement as evidence that it does not override the first agreement. The plaintiff further argued that the defendant is estopped from claiming the non-binding status of the first agreement (I note that in the plaintiff's written submssions, the plaintiff stated, 'the appellant is estopped from alleging now that he is not bound to the *second agreement*' which I believe is a typographical error).

**[18]** The plaintiff's submissions appear to stem from the pleadings of the defendant in paras 7 and 8 of the defence. In gist, the defendant pleaded that the second agreement has superseded the first agreement and it is impossible for both agreements to exist simultaneously. The defendant pleaded certain inconsistencies and lack of coherence between the terms of both agreements relating to the manner of payment of the purchase price, the release of the plaintiff as a guarantor and the transfer of shares and properties. The defendant pleaded that since the second agreement is a new written agreement that supersedes any terms in the first agreement, the prayer for a declaration that both the first agreement and the second agreement are valid and binding at the same time as in para 18(a) of the statement of claim is baseless and without merit.

**[19]** However, the thrust of the defendant's submissions is that section 5.03(1) of the second agreement is binding to the extent that the reliefs for specific performance as prayed for by the plaintiff cannot be sustained. That section 5.03(1) of the second agreement is binding on the plaintiff is consistent with the plaintiff's own stand that section 5.03(1) of the second agreement is a definite agreement to extend and supplement the second agreement which is enforceable and binding on both parties. This is borne out in para 17 of the plaintiff's written submission dated 13 May 2022 at the sessions court which is produced here in its entirety:

> 17. The Plaintiff's claims against the Defendant in this proceeding are premised on the Agreements signed by the Parties in 2018 and 2019 respectively wherein:-
>
> (a) The First Agreement whilst untitled is understood to be a settlement agreement between the Parties and contains the main terms and conditions. This infers that Parties had executed the First Agreement with the intention of executing a definite agreement subsequently.
>
> (b) The Second Agreement is titled 'Sale and Purchase Agreement' and was prepared as an extension of the First Agreement for the purpose of supplementing, inter alia, the terms relating to the sale and purchase of the sale of shares in GSSB under the First Agreement.

(collectively referred to as 'Agreements')

**[20]** Given the above, the plaintiff is bound by section 5.03(1) of the second agreement even when the first agreement and the second agreement are read harmoniously as there is not conflict between the two agreements. In any event, the plaintiff has not demonstrated to the court either in the affidavits or his submissions as to why the terms and conditions of the first agreement would support his position that he is entitled to the relief of specific performance as prayed for. The submissions of the plaintiff on this issue are therefore inconsequential to the issue of whether the plaintiff can claim for the reliefs for specific performance in this action. Whether the declaratory relief in para 18(a) of the statement of claim can be ordered will be addressed below in paras 37 to 41 of this judgment.

*Interpretation of section 5.03(1) of the second agreement*

**[21]** The plaintiff argued that cl 5.03(1) does not restrict the plaintiff from any reliefs or remedies, particularly for specific performance, as it would be illogical and contrary to business common sense. The plaintiff also submitted that it is against the interest of justice to bar a party from seeking legal remedies. The plaintiff referred to the Federal Court case of *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464 and the Court of Appeal case of *MBf Insurans Sdn Bhd v Lembaga Penyatuan & Pemulihan Tanah Persekutuan (FELCRA)* [2008] 2 MLJ 398 for the proposition that contractual interpretation should be guided by the reasonable expectations of sensible businessmen and a commercially sensible construction. The plaintiff maintains that cl 5.03(1) of the second agreement grants the plaintiff the entitlement to exercise his rights to terminate the agreement, and it does not bar the plaintiff from seeking specific performance. It is submitted that the defendant's interpretation lacks contemporaneous evidence and fails to justify striking out the plaintiff's claims. The plaintiff argued that there are arguable issues that require a full trial for proper examination of evidence and resolution of legal and factual matters. As such, according to the plaintiff, there are arguable issues that require a full trial for proper examination of evidence and resolution of legal and factual matters.

**[22]** I find the plaintiff's submission to be without merit.

**[23]** A plain reading of section 5.03 of the second agreement as a whole will show that the remedy of specific performance is only available to the defendant when the plaintiff breaches the second agreement. The remedy of specific performance was specifically agreed to be taken out or omitted in this clause for the breach of the second agreement by the defendant. My reasons for coming to this conclusion are stated below.

**[24]** Section 5.03 of the second agreement read as a whole contains clear and/or direct terms and there is no ambiguity in respect of the rights or remedies to the plaintiff and/or the defendant and what definite and/or specific consequences are available to the parties in case of the breach by either party of the terms and conditions under the second agreement. In *Lucy Wong Nyuk King (F) & Anor v Hwang Mee Hiong (F)* [2016] 3 MLJ 689 the Federal Court held that a contract must be construed as a whole, in order to ascertain the true meaning of its several clauses, and also, so far as practicable, to give effect to every part of it. Each clause in an ordinary commercial contract should be so interpreted as to bring them into harmony with the other clauses of the contract.

**[25]** As the remedy of specific performance is available to the defendant (the purchaser) when there is breach of section 5.03(2) by the plaintiff but was not available to the plaintiff (the vendor) when the defendant breaches section 5.03(1), it is only logical and commonsensical to interpret the two clauses together to mean that the option for specific performance is only available to the defendant when the plaintiff breaches the second agreement, but it is not an option nor election available to the plaintiff.

**[26]** The remedies available to the plaintiff and defendant as set out in section 5.03 of the second agreement are as follows:

(a) in section 5.03(1), when there is a breach by the defendant (purchaser), no remedy of 'specific performance' is set out nor available, but the plaintiff (vendor) 'shall' be entitled to terminate the agreement (where the agreement is deemed null and void), forfeit the first sum ie a sum of RM80,000 already paid by the defendant to the plaintiff as liquidated damages, retransfer the shares to the defendant and have his directorship reinstated;

(b) in section 5.03(2), when it comes to the breach by the plaintiff (vendor), the remedy of the specific performance is specifically set out in section 5.03(2)(i) or payment of the liquidated damages (amount equivalent to the first sum), retransfer the shares to the defendant and have the plaintiff's directorship reinstated as set out in section 5.03(2)(ii) and the agreement is deemed null and void (ie terminated) pursuant to an election by the defendant (purchaser) via an 'election notice'.

**[27]** Section 5.03 of the second agreement is a termination clause and ought to be construed strictly. See *Catajaya Sdn Bhd v Shoppoint Sdn Bhd & Ors* [2021] 2 MLJ 374 (FC). When section 5.03 is given a strict construction, this will result in an interpretation that the clause specifies the definite and/or specific consequences or remedy available to the parties in case of the breach by either party of the terms and conditions under the second

agreement. Where a particular breach averred is anticipated by an agreement and a specific remedy is provided in that event, the contractual remedy must be seen as being intended as a substitute for, and not as a supplement to, those at common law. See *James Hugh Hutchison and another v Mary Graham's executrix* [2006] SCLR 587.

**[28]** The plaintiff is unhappy with an interpretation that excludes the remedy of specific performance as it will result in his not being able to wash his hands clean of the directorship and ownership of shares in the company. However, it is is not meritable for the plaintiff to argue that such interpretation of the terms in the second agreement would result in an outcome which the plaintiff now dislikes. In *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122, it was held that the court must give effect to the plain meaning of the words however much it may dislike the result.

**[29]** The first agreement and the second agreement can be read harmoniously and there is nothing in the first agreement which contradicts and/or affect section 5.03(1) of the second agreement. Given this, based on the interpretation of the contract, oral evidence by witnesses is irrelevant and unnecessary

**[30]** The plaintiff also argued that the defendant's interpretation of cl 5.03 would preclude the plaintiff from claiming remedies for a breach of contract based on the second agreement and this would contravene s 29 of the Contracts Act 1950. The plaintiff referred to the Federal Court case of *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1 for the proposition that a contractual clause that eliminates a party's right to seek remedies, including damages, for breach of contract or negligence is void under s 29 of the Contracts Act 1950. However, in the *Bourke* case, the clause in question attempted to prohibit the borrower from suing the bank for any loss or damage incurred by the borrower including loss of income or profit, savings, and various other indirect, incidental, consequential, exemplary, punitive, or special damages. This was an absolute restriction against the customer against suing the bank for all remedies of damages against the bank. Clause 5.03 in the instant case is not an absolute restriction against the defendant. When the defendant as the purchaser breaches his obligations to pay the considerations as provided in the second agreement, the plaintiff is entitled to liquidated damages when terminating the agreement. However, in the circumstances, as the first sum has already been paid by the defendant to the plaintiff, there is no need for the plaintiff to sue the defendant for liquidated damages in the event of such a breach. Therefore, the plaintiff's argument on the contravention of s 29 of the Contracts Act 1950 is not valid.

**[31]** The plaintiff also argues that as the words 'shall be entitled' is used in cl 5.03 of the second agreement the term does not confine the plaintiff's rights to a claim for liquidated damages alone and the right to action for damages for breach of contract is not taken away since this was not expressly provided. However, the court finds this argument erroneous as it is clear from a comparison of section 5.03(1) and section 5.03(2) that as the remedy of specific performance is available in the latter and not the former, the right of the plaintiff to claim for specific performance was contractually removed when the breach is by the defendant.

*The plaintiff's claim is in breach of section 5.03(1) of the second agreement*

**[32]** I find that the plaintiff's claim and reliefs are in breach of section 5.03 of the second agreement. The main prayers for specific performance, general damages, and exemplary damages in paras 18(c), (d) and (e) of the statement of claim are unsustainable.

**[33]** As decided in the case of *James Hugh Hutchison and another v Mary Graham's executrix* the Court of Session, Outer House held that when a particular breach is anticipated by an agreement and a specific remedy is provided, the contractual remedy must be seen as a substitute for common law remedies. Therefore, specific performance is not available to the plaintiff, as stated in paras 18(c)(i) to (iii) of the statement of claim.

**[34]** Regarding the claim for general damages in para 18(d) of the statement of claim, the plaintiff can only forfeit the first sum already paid by the defendant, which is a specific amount. This renders the claim for general damages unsustainable. In *Scottish Power UK plc v BP Exploration Operating Co Ltd and others* [2016] 1 All ER (Comm) 536, the Queen's Bench Division held a party can only maintain a claim for damages if they can prove that the amounts they would have nominated for delivery, had the breach not occurred, exceed the amounts they actually nominated. No argument has been raised or evidence has been led by the plaintiff to that effect. Here, the plaintiff only prays for general damages, and in the face of the defendant's application to strike out para 18(d) says nothing more on why general damages should be given. It is clear that the plaintiff is limited to the remedy provided by section 5.03(1) of the second agreement and cannot maintain a claim for damages.

**[35]** The plaintiff's claim for exemplary damages in paragraph 18(e) of the statement of claim also lacks a legal basis, as the criteria for such damages are not met. The authorities of *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610 and *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; [1993]

1 MLRH 142 provide the factors to be considered in awarding exemplary damages, and none of them are present in this case. These are conduct of the wrongdoer which is outrageous, elements such as malice, cruelty, fraud, or insolence, oppressive actions by officers of the state, when a defendant intentionally disregards the plaintiff's rights and calculates that the profits from the wrongdoing will likely exceed the potential damages and when exemplary damages is expressly authorised by statute.

**[36]** Lastly, it is clear that the plaintiff, by refusing to comply with section 5.03(1) of the second agreement, is attempting to benefit from their own breach. The word 'shall' in the phrase 'shall be entitled' found section 5.03(1) of the second agreement is interpreted to mean that the remedy of termination of the second agreement and forfeiture of the first sum as agreed liquidated damages is mandatory in nature in the construction of contract. Therefore, by refusing to comply with section 5.03(1) of the second agreement and initiating a legal action instead on the basis of the breach of section 4.01(b), 4.02, 4.03 and 4.04 under Article IV of the second agreement against the defendant at the sessions court and claiming for the reliefs which contradicts with the reliefs provided under section 5.03(1) of the second agreement, the plaintiff is breaching the second agreement. The plaintiff cannot be allowed to take advantage of his own breach. The authority of *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489 establishes that a litigant should not be permitted to benefit from his own wrongdoing.

*Declaratory relief in paras 18(a) and 18 (b) statement of claim*

**[37]** The declaratory relief sought in paras 18(a) and 18(b) of the statement of claim is unnecessary and infructuous.

**[38]** The declaration in para 18(a) seeks that both the first agreement and the second agreement is valid and binding although there is no dispute by the defendant that both are valid and binding and also that section 5.03(1) is binding on the plaintiff. The defendant through his previous solicitors, in the letter dated 11 February 2022 had already stated that he is willing to comply with section 5.03(1) of the second agreement. Therefore, the declaratory relief is academic and serves no purpose.

**[39]** The declaration in para 18(b) that the defendant purportedly 'breached' the terms and conditions of the said agreement also serves no purpose as there is no issue on this as given that the defendant had breached the agreement, the plaintiff only has to follow the remedy in section 5.03(1) of the

second agreement ie to terminate the agreement, forfeit the first sum, liquidated damages, retransfer the shares to the defendant and have his directorship reinstated.

**[40]** The High Court cases of *Raja Singam a/l Velu lwn Affin-ACF Finance Bhd dan lain-lain* [2007] 6 MLJ 430 and *Goh Joon v Kerajaan Negeri Johor & Ors* [1998] 7 MLJ 621 (HC) establish that declaratory relief is discretionary and should be granted only when reasonable and necessary. In this case, the relief sought is not productive of any benefit and would be infructuous or useless.

**[41]** As the main relief of paras 18(c), 18(d) and 18(e) of the statement of claim are also unsustainable as held above, the declaratory reliefs sought in paras 18(a) and 18(b) of the statement of claim are academic.

CONCLUSION

**[42]** After careful consideration of the submissions and affidavits, I am persuaded to agree that the plaintiff lacks a valid cause of action and fails to establish a proper basis for the reliefs sought in the statement of claim. The plaintiff's claim is obviously unsustainable. The interpretation of the terms in the second agreement, with due regard to their plain and ordinary meaning, supports this finding. In the case of *Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587 it was recognised that the primary duty of a court in construing a written contract is to ascertain the intention of the parties from the words of the instrument. If the language used is unambiguous, the court must give effect to it, even if the result may appear capricious or unreasonable. The court does not possess the power to amend or alter a contract to avoid inconvenient or unjust outcomes.

**[43]** In line with this principle, both parties are bound by the specific reliefs set forth in the second agreement, and the plaintiff is estopped from contravening section 5.03(1) of the agreement, which outlines the agreed-upon specific remedies in the event of a breach by the defendant. When parties proceed on the basis of an underlying assumption, neither party should be permitted to depart from that assumption when it would be unfair or unjust to do so. The Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 held that when parties proceed on the basis of an underlying assumption, neither party should be allowed to deviate from that assumption when it would be unfair or unjust to do so. In such cases, the courts will provide the appropriate remedy as dictated by equity.

**[44]** Consequently, based on the aforementioned analysis and authorities, I reverse the decision of the learned sessions court judge and allow the appeal.

*Appeal allowed.*

Reported by Ahmad Ismail